No. 77-1373

IN THE
Supreme Court of the United States
OCTOBER TERM, 1977

MAINE CENTRAL RAILROAD COMPANY, *Appellant*,
v.
RAYMOND L. HALPERIN, et al., *Appellees*.

On Appeal from the Supreme Judicial Court of Maine

REPLY TO MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

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In their Motion to Dismiss or Affirm, appellees mischaracterize certain issues, fail to address others and misconceive constitutional principles governing the questions presented.

I. THE SUPREMACY CLAUSE ISSUE.

1. Appellees attempt to dismiss, as mere "speculation of an employee of the I.C.C." (Motion to Dismiss, p. 5), the stipulated and uncontradicted testimony of a Commission official in the court below. Buttressed by the Commission's regulations and interpretive rulings, he detailed the restrictions on the use of IPD funds; he explained the Commission's intent that IPD receipts should not increase the tax liability a carrier must pay out of its general corporate funds; and he

described the tendency of the Maine Railroad Excise Tax as it was interpreted and applied in this case to frustrate the full effectiveness of the IPD program by burdening appellant's general corporate assets, lowering its rate of return on boxcars below that which the Commission has found necessary to stimulate acquisition of boxcars, and threatening the ability of railroads in Maine to acquire with their own funds the quota of boxcars that must be satisfied before restricted IPD funds may be used. (Juris. St., pp. 15, 17-22.)

The Interstate Commerce Commission official who appeared below was authorized by the Commission to testify as an expert concerning the purposes, structure and policies of the IPD regulations. The Commission intervened as *amicus curiae* in support of appellant's position, and its counsel participated in the preparation of the Agreed Statement of Facts that included the testimony. Commission counsel signed the Agreed Statement. (*See* R. 43.) Furthermore, counsel for the Commission advises counsel for appellant that the Commission adheres to the position it took below and will confirm its position should the Court so desire. The entire premise of appellees' argument—the view that the Commission's intent is "so uncertain" (Motion to Dismiss, p. 6)—is a weak premise indeed.

2. When they contend that it is essentially a factual question whether application of Maine's excise tax to IPD receipts in this case frustrates the federal IPD program (Motion to Dismiss, p. 6), appellees ignore the direct conflict with the IPD regulations posed by the refusal of the court below to give effect to the earmarking restrictions contained in the regulations. Moreover, their factual analysis, like that of the court below, rests on the erroneous assumption that the state

tax officials and state courts may, without running afoul of federal law, reach their own conclusions about which aspects of federal regulatory schemes may be compromised with state law at acceptable cost to the federal scheme. Appellees do not ask whether general corporate funds are burdened by taxes attributable to unused and restricted IPD funds; they assert instead that appellant possessed enough funds to pay the tax. (Motion to Dismiss, p. 6). Likewise, they deem it irrelevant that charging general funds with the obligation to pay a tax on unused restricted funds could disable railroads in Maine from fulfilling IPD quota requirements, because they conclude that "for many railroads, the quota requirement is meaningless." (Motion to Dismiss, p. 7.) And we have already shown (Juris. St., pp. 22-23) how surrender of appellant's IPD funds to other carriers (Motion to Dismiss, p. 9) would frustrate the goals of the IPD program.

II. THE COMMERCE CLAUSE AND DUE PROCESS ISSUES.

Appellees do not deal satisfactorily with either of the principal points of the jurisdictional statement—that unused IPD receipts that must be held in trust in the restricted IPD fund add nothing to the "value of the franchise," and that the application of the mileage apportionment formula was an improper basis for apportioning NROI attributable to freight rental income, composed chiefly of IPD income.

1. Appellees simply ignore the critical failure of the court below to explain how appellant's unused IPD receipts, which must be held in trust in the earmarked IPD fund and which might never be used, justify heavier taxation by adding to the "value of the franchise." (Juris. St., p. 29.)

2. Appellees' discussion of the mileage apportionment formula fares little better than silence. They devote an extended discussion to the subject of NROI, contending that "[t]he apportionment of NROI, in itself, is inconsequential to the fairness of the apportionment of the entire Maine railroad excise tax" (Motion to Dismiss, p. 10) and that NROI, in any event, is "a false indication of the railroad's business activity." (Id., p. 13.) The fact is that the apportionment of NROI is used to determine the tax rate to be applied. A fair apportionment of NROI would have resulted in the application of a lower tax rate, increased the diminishment amount and, because taxes are levied on gross receipts, a far lower tax. We disagree that NROI is a "false indication;" it is a measure of the net operating income of railroads used throughout the railroad industry, and recognized alike by ICC accounting regulations and Section 2624 of the Maine Railroad Excise Tax.[1] In any event, NROI is the measure of income apportioned by the Maine Railroad Excise Tax, and it must be fairly apportioned.

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[1] Appellees' speculate about the costs that should be charged to boxcar revenues as opposed to freight revenues. (Motion to Dismiss, pp. 13-14.) They also note that some 92.5 percent of appellant's 1974 revenues were freight revenues. (*Id.*) Accordingly, even if 7.5 percent of costs associated with boxcars were reapportioned (and there are strong reasons why that should not be done) the impact on boxcar rental income would be minor.

CONCLUSION

The Court should note probable jurisdiction and set the case for briefing and argument on the merits.

Respectfully submitted,

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